Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALBERT RIMELL,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower courts erred in failing to grant a hearing or other relief where Petitioner was denied constitutionally effective assistance of counsel because trial counsel 1) failed to investigate facts or to interview critical witnesses; 2) allowed a non-licensed individual to cross-examine witnesses; 3) refused to release the file to new counsel to allow adequate preparation for sentencing; and because new counsel 4) failed to properly raise important sentencing issues in either the district court or the court of appeals; and, 5) failed to properly raise the issue of trial counsel's ineffectiveness in either the district court or the court of appeals?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Albert Rimell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which denied his request for a Certificate of Appealability on August 1, 1997.

OPINION BELOW

On August 1, 1997, the Court of Appeals for the Eighth Circuit affirmed the district court's denial of Petitioner's Motion to Vacate, Set-Aside or Amend the Sentence pursuant to Title 28 U.S.C. § 2255 by its refusal to issue a Certificate of Appealability. The Order of the Eighth Circuit is set forth in this petition as Appendix A. The Petitioner did not file a Petition for Rehearing in the Eighth Circuit.

JURISDICTION

Jurisdiction of the United States District Court was founded in 28 U.S.C. § 2255. Jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 2253. The order of the Court of Appeals for the Eighth Circuit denying the request for Certificate of Appealability was entered n August 1, 1997. This Petition for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and Supreme Court Rule 10.1(a).

CONSTITUTIONAL AND FEDERAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State of district wherein the crime shall have been commit-

> ted; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Title 28 United States Code § 2255 is set forth in the Appendix D.

Rule 12 of the Local Rules for the Federal District Court for the Eastern District of Missouri is set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner was convicted in the Federal District Court for the Eastern District of Missouri of eleven counts of bank fraud, six counts of making false entries in bank records, one count of fraudulently transferring or concealing property in contemplation of bankruptcy and three counts of fraudulently concealing the proceeds of a sale in contemplation of bankruptcy. Petitioner appealed his conviction and sentence. The judgment was affirmed. Petitioner then filed a motion pursuant to Title 28 United States Code § 2255 and was denied relief by the district court and the court of appeals.

Petitioner was represented by one attorney through the trial and new counsel at sentencing and on appeal. Jane C. Hogan represented Petitioner in the district court and the Eighth Circuit in the motion pursuant to Title 28 U.S.C. § 2255 and has provided research and writing assistance for this petition. Howard Shalowitz, a member of the bar of this court, has entered the case for the filing of this petition because Ms. Hogan is not licensed in this court.

The facts of this case demonstrate fundamental defects in the criminal justice system, resulting in a miscarriage of justice such that setting-aside of the judgment is required. Petitioner con-

tends here, as he did in the courts below, that, because he was so ineffectively represented at trial, sentencing, and on appeal, his conviction must be set-aside and a new trial ordered or, at the very least, resentencing.

Petitioner asserts that his trial counsel was ineffective for several reasons. First, although informed of the existence of many witnesses, trial counsel refused to interview witnesses or review documents related to potential testimony. *See*, Trial Transcript (counsel called no witnesses and presented no defense beyond cross-examination, some of which was conducted by an unlicensed individual.) *See also, Petition for Writ of Error Coram Nobis* and attachments.

According to affidavits and other documents, trial counsel told Nathaniel R. Helms, an investigator hired by counsel, that he would not do any significant work on Petitioner's case and that Helms should "keep [Petitioner] off [his] back." Counsel also refused to deliver Petitioner's files to new counsel after he had been fired, impairing preparation for sentencing.

Trial counsel also allowed an unlicensed individual, to participate significantly in the preparation and presentation of the case. The unlicensed person was allowed to cross-examine witnesses in front of the jury, contrary to the Local Rules for the Federal District Court for the Eastern District of Missouri. There is nothing in the record to suggest that Petitioner was aware of this individual's status or of the court rules regarding representation by unlicensed individuals. To the contrary, upon learning of the situation, Petitioner retained new counsel. *See Petition for Writ of Error Coram Nobis* and attachments thereto.

The transcript and the court file are silent as to any acknowledgement or agreement by Petitioner. Petitioner was never aware that this individual was unlicensed. Petitioner never approved, either verbally or in writing, the participation of any

unlicensed person to interrogate witnesses or to represent him in any fashion before the court.

The record is bare of any colloquy between the district court and Petitioner. Nor is there any evidence that the district court had any discussion with the unlicensed person to determine his ability to adequately represent a criminal defendant.

On direct appeal, the Eighth Circuit examined the issue of ineffective assistance of counsel, as raised by appellate counsel, only for a *per se* violation of the Sixth Amendment based on representation by an unlicensed attorney, and found none. However, trial counsel's failure to inform Petitioner of the unlicensed person's true status and the applicable law is but one example of counsel's total ineffectiveness, although others were not addressed by appellate counsel. Trial counsel's acts (or lack of) throughout the trial show his negative attitude toward Petitioner and the representation and sustain an assessment constitutionally ineffective assistance of counsel throughout the trial.

At sentencing and on appeal, Petitioner was represented by new counsel. The presentence reports and applicable guidelines show that the dollar amounts used in determining the sentencing ranges were incorrect. The presentence reports used the highest total loss reported by the victims. These figures included consequential damages such as interest and attorneys' fees. As to some figures, it is not stated how the loss was decided.

U.S.S.G. §2F1.1 was used in calculated the offense level. However, the probation office used gross losses instead of actual loss to the victims, contrary to application note 7, which specifies that the loss in this type of case is the actual loss, *i.e.*, the amount of the unpaid loan minus the amount recovered. The loss amount therefore, should not have included accumulated interest or attorney's fees. Additionally, a second set of figures was available from Pioneer Bank, the main "victim," which reflected lower losses than those used in the presentence report. New

counsel failed to challenge either the incorrect application of the guidelines or the incorrect figures provided by Pioneer either in the district court or on appeal.

Counsel also failed to object to the two-point enhancement assessed for violation of a judicial order and obstruction of justice pursuant to §2F1.1(b)(3)(B) and §3C1.1. According to the guidelines, the §2F1.1(b)(3)(B) enhancement should only be given where the conduct is not addressed elsewhere in the guidelines. Here, the sentences imposed for bankruptcy fraud were enhanced by two points pursuant to 2F1.1 and an additional two points for the same conduct under 3C1.1. *See* Presentence Report, paras. 46, 48 and 51.

Had these errors been raised in the district court it is likely the court would have found the sentencing range to be substantially lower and most likely would not have imposed consecutive sentences to reach the higher range. However, counsel concentrated all efforts on the preparation of an improper *Petition for a Writ of Error Coram Nobis* and allowed viable issues to waiver in the district court and the Eighth Circuit.

As set forth above, the sentences imposed violated the law because they were based on incorrect figures and "double counted" certain conduct. The sentences also violated the law because Petitioner was ineffectively represented by counsel at that critical stage of the proceedings. *See U.S. v. Rimell*, 21 F.3d 281 (8th Cir. 1994).

REASONS FOR GRANTING THE WRIT

The judgment in this case is contrary to prior decisions of this Court, to relevant Eighth Circuit rulings and to the decisions of other circuits in like cases. To allow the lower court decisions to stand would establish new precedent in the area of effective assistance of counsel.

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *U.S. v. Cronic*, 466 U.S. 648, 654 (1984). "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). "For that reason, the Court has recognized that 'the right to counsel is the right to effective assistance of counsel.'" *Id.*, at 692. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, at 691.

"Regardless of his pervasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court." *Wheat v. U.S.*, 486 U.S. 153, 159 (1988). "One reason for such a per se rule is that in order for the criminal justice system to maintain its structural integrity and the public's trust, an accused must be represented by counsel who has

received the training necessary for admission to the bar and who is subject to the court's supervision." *U.S. v. Rosnow*, 981 F.2d 970, 971-72 (8th Cir. 1992).

In determining whether a criminal defendant may waive counsel entirely, we "ask whether the defendant made an informed decision." *U.S. v. Flores*, 5 F.3rd 1070, 1078 (7th Cir. 1993). "[F]or a District Judge to exercise his discretion to allow a person to try a case who was not a member of the bar of the court and who had not qualified by taking the required examination, would at a minimum require a showing that such person was sufficiently learned in the law to be able adequately to represent his client in court." *U.S. v. Whitesel*, 543 F.2d 1176, 1180 (6th Cir. 1976).

Rule 12 of the Local Rules for The Eastern District of Missouri governs attorney admissions and practice and is set forth in this Petition as Appendix C. Rule 12.5 states that law students who are "certified with the Missouri Supreme Court under Missouri Supreme Court Rule 13 . . . [may] assist in the preparation and presentation of a criminal case. [Provided that b]efore such assignment is made, the party being represented must consent in writing . . . however th[e] student shall not interrogate witnesses or present argument in the presence of a jury in a felony case." Despite this rule, an unlicensed individual was allowed to cross-examine at least five witnesses. The transcript and the court file are silent as to any acknowledgement or agreement by Petitioner.

The Eighth Circuit examined the issue of ineffective assistance of counsel only for a *per se* violation of Petitioner's Sixth Amendment rights and found none. Although recognizing that the Second Circuit has "adopted a per se rule that the representation by one who had never been admitted to the practice of law is an outright violation of a defendant's sixth amendment right to counsel," *U.S. v. Rosnow*, 981 F.2d 971-72, the Eighth Circuit held here that "there is no *per se* violation of a defendant's Sixth

Amendment right to counsel when a person not properly licensed to practice law *jointly* represents a defendant." *U.S. v. Rimell*, 21 F.3d 281, 285 (8th Cir. 1994)(emphasis added).

However, the question of effective assistance of trial counsel should be examined based upon all that counsel knew and did at the time of the trial, not on hindsight. *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1537 (10th Cir. 1994). Counsel "failed to exercise the customary skills and diligence that a reasonable competent attorney would exhibit under similar circumstances" by refusing to investigate and interview witnesses who may have been crucial to the defense and by allowing an unlicensed lawyer to perform tasks reserved for counsel. *Starr v. Lockhart*, 23 F.3d 1280, 1284 (8th Cir. 1994).

"The Sixth Amendment right to counsel attaches at every critical stage of the prosecution." *Hanson v. Passer*, 13 F.3rd 275, 278 (8th Cir. 1994). "[A] federally convicted defendant has the right to a direct appeal from his conviction . . . as well as the constitutional right to the effective assistance of counsel on that appeal." *U.S. v. Tajeddini*, 945 F.2d 458, 467 (1st Cir. 1991).

Here, sentencing and appellate counsel, failed to raise substantial issues affecting sentencing and failed to adequately raise and brief issues on appeal. *See U.S. v. Rimell*, 21 F.3d 281.

Because the judgment violates the Sixth Amendment and is contrary to controlling precedent and decisions of other circuits, this court should review this case to determine the constitutionality of Petitioner's convictions. To allow the lower court decisions to stand would establish new precedent.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the Eighth Circuit.

Respectfully submitted,

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